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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

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STATE OF LOUISIANA, *et al.*, *Appellants*
v.
RAY HAYS, *et al.*, *Appellees*

On Appeal from the United States District Court
for the Western District of Louisiana

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ZELL MILLER, *et al.*, *Appellants*
v.
DAVIDA JOHNSON, *et al.*, *Appellees*

On Appeal from the United States District Court
for the Southern District of Georgia

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# BRIEF OF RUTH O. SHAW, MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT, and DOROTHY G. BULLOCK, as AMICI CURIAE IN SUPPORT OF APPELLEES

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## INTEREST OF THE *AMICI CURIAE*

The *amici curiae* -- Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, and Dorothy G. Bullock -- are the five North Carolina voters who, in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), attacked that

State's congressional redistricting as a racial gerrymander. After this Court ruled there that they had stated a claim for relief, the three-judge District Court held on remand that they had established a racial gerrymander, but a majority concluded that the State had shown a compelling governmental interest and a narrowly tailored remedy. From that decision they have appealed and filed their jurisdictional statement in this Court. *Shaw v. Hunt*, (No. 94-923). Thus, the *amici* have a continuing interest in assuring that they and other voters are not deprived of equal protection by the use of explicit or implicit racial classifications in the creation of congressional districts.

The *amici*, however, are not surrogates or proxies for any group; nor are they exponents of group rights. Instead they are individuals who -- at their own expense -- have been contesting for three years what they believe to be unwarranted reliance on racial classifications in the election of Representatives to the United States Congress. Because of their extensive involvement in *Shaw*, the *amici* have acquired insights and information which they believe will be helpful to the Court in deciding the present appeals from decisions overturning racial gerrymanders in Louisiana and Georgia. Moreover, the *amici* believe that their brief will assist the Court in evaluating the assertions and argument in the *amicus* brief that the State of North Carolina -- along with Texas -- has submitted in connection with these appeals.

## SUMMARY OF ARGUMENT

Since this Court's decision in *Shaw*, desperate efforts have been made to evade or to limit the logical implications of the majority opinion. Indeed, to this end, a calculated campaign of ridicule and invective was initiated against *Shaw* --especially by some of the beneficiaries of the racial classifications whose use the majority opinion denounces.[1]

In like fashion, the appellants and their allies now seek cunningly to minimize the impact of *Shaw* by asking this Court to impose an unwarranted requirement that plaintiffs attacking a racial gerrymander establish the "bizarreness" of the districts involved. Moreover, the appellants erroneously minimize the importance of "traditional districting principles" and treat as irrelevant familiar concepts like "compactness" and "contiguousness".

To justify the egregious racial gerrymanders of Louisiana and Georgia, appellants seek to transmute into a "compelling state interest" the unauthorized expansion of Section 5 of the Voting Rights Act by the Civil Rights Division and the craven capitulation of State officials to

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1 For example, there have been comments that the opinion was concerned with "aesthetics"; and Congressman Melvin Watt -- who represents North Carolina's serpentine, majority-black Twelfth District -- has stated on national television that he believed the assumptions of the majority opinion in Shaw were "racist". *See* Jurisdictional Statement in *Shaw v. Hunt* No. 94-923, p. 7, n.6.

that "power grab" by Federal bureaucrats.[2] To bolster their weak justification of the racial gerrymanders, the appellants seek to turn the burden of persuasion on its head. Then they distort the plain meaning of "narrow tailoring" by extending the concept to encompass the creation of dysfunctional majority-minority districts without full consideration of less disruptive alternatives. Finally, the appellants mistakenly praise their handiwork as a remedy for racial polarization -- when, in fact, it is just the opposite.

## ARGUMENT

### I. Creating Congressional Districts On The Basis Of Race Violates Equal Protection Whether Or Not The Districts Are "Bizarre".

The complaint which this Court considered in *Shaw* contained allegations that North Carolina's two majority-black districts were "amorphous" (par. 28) and "bizarre" (par. 36A) [3] However -- despite the appropriateness of these two adjectives -- an examination of the entire

2 In the present context, for State officials to rely as a defense on their own acquisition in the unwarranted assertion of authority by the bureaucrats of the Civil Rights Division is the functional equivalent of the "Nuremberg defense" -- and is equally unconvincing.

3 *See* Jurisdictional Statement in *Shaw v. Reno* (No. 92-357) at pp. 88a, 103a.

complaint makes clear that it is premised on the fact that racial classifications were used in creating the congressional districts. *Id.* at 67a, 107a. Nonetheless, the appellants in *Hays* and *Johnson* and their supporting *amici* have attempted to make *Shaw* almost irrelevant by insisting that "bizarreness" of the racially gerrymandered districts is a necessary part of the claim for relief and that -- with the possible exception of the two majority-black districts involved in *Shaw* itself -- there simply are no districts which are so extraordinary as to fulfill this requirement.

This limiting interpretation cannot be reconciled with *Shaw's* own emphasis that, under the Equal Protection Clause, all purposeful racial classifications are subject to strict scrutiny. *See* 113 S.Ct. at 2824-25. According to the Court, equal protection "demands strict scrutiny of all racial classifications". 113 S.Ct. at 2830. Indeed, the Court quotes an earlier pronouncement that a "racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification". *Id.* at 2825, quoting *Personnel* **Adm'r v. Feeney, *442 U.S. 256, 272 (1979).***

A half century ago, this Court stated that:

> Distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.

*Hirabayashi v. United States,* 320 U.S. 81, 100 (1943); *see also Koramatsu v. United States,* 323 U.S. 214, 216 (1944)("the most rigid scrutiny required").

There the use of such classifications was reluctantly upheld, because of a perceived danger to national security during a declared war; [4] but this Court has never retreated from its hostility to the use of racial classifications [5] -- whether they were overt or concealed. [6] To introduce a requirement that plaintififs attacking a racial gerrymander

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4 In retrospect, the supposed justification for the exclusion of Japanese-Americans from the West Coast and their internment appears questionable. *Korematsu v. United States*, 584 F.Supp. 1406 (N.D.Cal.1984); *Hirabayashi v. United States,* 828 F.2d 591 (9th Circuit 1987). This unhappy history illustrates the need for exceptional caution in undertaking the "benign" use of racial classifications.

5 *See e.g., Loving v. Virginia,* 388 U.S. 1, 11 (1967); *Palmore v. Soditi,* 466 U.S. 429 (1984); *Powers v. Ohio, 499* U.S.400 (1991).

6 In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the use of the racial classification was not explicit but was implicit in changing the shape of the City of Tuskegee from a square to a 28-sided figure.

on equal protection grounds must show "bizarreness" of the districts would constitute such a retreat. At the same time, it would unnecessarily require this Court and the lower courts to establish criteria for "bizarreness".

As the Court recognized in *Shaw* (at 2827), a "bizarre" district reminds voters that, with specific governmental approval, racial stereotypes are being relied on in the electoral process. This, in turn, may enhance racial polarization by appearing to bless it. However, the crucial factor is the governmental use of racial classifications to achieve an intended result -- whether or not the voters are fully aware of that use or that result. Indeed, if the Court accepted appellants' contention that proof of "bizarreness" is required, a state legislature's stated purpose to draw district boundaries along racial lines would require no scrutiny, so long as a court was unpersuaded that the districts created were "bizarre". Creating such an exception would be inconsistent with this Court's emphatic disapproval of reliance on racial or gender stereotypes.[7] Moreover, to allow such an

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7 *Powers, supra,* n.5; *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991); *J.E.B. v. Alabama ex rel T.B.,* 114 S.Ct. 1419 (1994); Note, 44 DUKE L.J. 298 (1994). The Court also has held invalid the use for governmental purposes of boundaries drawn along religious lines. *Board of Education of Kiryas Joel Village School District v. Grumet,* 114 S.Ct. 2481 (1994). Of course, permitting a peremptory challenge or taking other governmental action which has a disparate effect on a particular racial or ethnic group will not violate the Equal Protection Clause when the action is taken for a reason independent of race or

(continued...)

exception would be inconsistent with the rationale for recognizing "the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification". *Id.* at 2830. *See also* Note, 44 DUKE L.J. 298 (1994).

Although not required as an element of the claim for relief under the Equal Protection Clause, "bizarreness" does have an important evidentiary role. As the three-judge District Court recognized in *Hays,* 839 F.Supp. 1188, 1194-5 (W.D.La. 1993) the redistricting map may point unerringly to the racial motivation for the plan being attacked. Indeed, when, during oral argument in *Shaw*, the members of this Court looked at the map of the North Carolina congressional districts, they must have had little doubt as to the underlying purpose. [8]

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7(...continued)
ethnicity. *Hernandez v. New York, 500* U.S. 352 (1991).

8 The District boundaries may provide strong circumstantial evidence of a racial gerrymander. However, there may be other types of evidence. For example, there may be statements of legislators -- like those of North Carolina Senator Dennis Winner who, after meeting with Assistant Attorney General John Dunne on December 17, 1991 (the day before North Carolina had been denied Section 5 preclearance), informed his fellow Senators that Dunne wanted "quotas". *See,* Jurisdictional Statement in *Shaw v. Hunt,* No. 94-923 at p.13. Moreover, the heavy-handed tactics of the Civil Rights Division in denying Section 5 preclearance have made clear the racial

(continued...)

In addition to being evidentiary, "bizarreness" of districts, if present in a plan drawn along racial lines, will be an aggravating factor because it tends to make those districts dysfunctional. Judge Edith Jones described this harm in some detail in *Vera v. Richards:*

> **Traditional, objective districting criteria are a concomitant part of truly "representative" single member district plans. Organized political activity takes place most effectively within neighborhoods and communities; on a larger scale, these organizing units may evolve into media markets and geographic regions. When natural geographic and political boundaries are arbitrarily cut, the influence of local organizations is seriously diminished. After the civic and veterans groups, labor unions, chambers of commerce, religious congregations, and school boards are subdivided among districts, they can**

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8(...continued)

purpose for creating the gerrymandered majority-minority districts. However, the proponents of these districts do their best to obscure the facts with euphemisms. For example, sometimes the term "minority opportunity" district is used in place of "majority-minority". *See e.g.*, the Amicus Brief of the State of Texas at p. 14. Likewise, there sometimes is a failure to make clear that "majority-minority" does not mean that there is no majority of any race but, instead, that it means that a "minority" constitutes more than half the voting age population of a district. Another tool for obscuring the presence of a racial purpose is provided by "*post hoc* rationalizations" --whose use was denounced by the three-judge District Court in *Hays*, *supra* at 1203.

> no longer importune their Congressman and expect their Congresman to wield the same degree of influence that they would if all their members were voters in his district. Similarly, local groups are disadvantaged from effectively organizing in an election campaign because their numbers, money, and neighborhoods are split. Another casualty of abandoning traditional districting principles is likely to be voter participation in the electoral process. A citizen will be discouraged from undertaking grass-roots activity if, for instance, she has attempted to distribute leaflets in her congressman's district only to find that she could not locate its boundaries.

861 F.Supp. at 1334 n. 43. [9]

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9 Judge Jones added:

As the influence of truly local oroganizations wanes, that of special interests waxes. Incumbents are no longer as likely to be held accountable by vigilant, organized locala interests after those interests have been dispersed. The bedrock principle of self-government, the interdependency of representatives and their constituents, is thus undermined by ignoring traditional districting principles. *Ibid.*

That the harms she described are not imaginary was demonstrated by the evidence in *Shaw v. Hunt*. According to a survey sponsored by the State of North Carolina in the fall of 1993, Representative Melvin Watt was properly identified as their congressman by only 6% of the voters polled in the "bizarre" twelfth district, but 6% believed their congressman was [Senator] Jesse Helms, 8% believed it was [Ninth

(continued...)

The harmful effects that result from "bizarre" congressional districts which often accompany racial gerrymandering tend to contradict any claim by the State that the creation of these districts reflects a "compelling governmental interest". How can a state believe itself "compelled" to create districts which adversely affect participation by voters in the electoral process and their communication with incumbents and challengers?

The presence of "bizarre" districts will also indicate the absence of "narrow tailoring". However, the importance of "bizarreness" for these purposes does not make it an element of the plaintiffs' claim for relief. The assault on the constitutional principle of equal protection, which results from racial gerrymandering, is still an assault, whether or not it is aggravated by the baneful effects of districts which defy traditional districting principles.

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9(...continued)
District] Congressman McMillan, and 14% thought that [Sixth District] Congressman Howard Coble represented them. *See*, Jurisdictional Statement in *Shaw v. Hunt* [94-923] at p. 21. According to a newspaper report on November 9, 1994, confusion still persisted about district boundaries at the time of the last election. *Ibid.*

## II. A Racial Gerrymander Is Established When The Plaintiffs Prove That Race Was A Substantial Motivation In The Drawing Of District Lines.

In *Hays* the three-judge district court concluded that the plaintiffs need only establish that race was a substantial factor in drawing the congressional district lines. This conclusion is fully supported by such cases as *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) and *Hunter v. Underwood*, 500 U.S. 352 (1991).

In *Johnson*, the district court apparently applied a more rigorous standard -- that race be the predominant factor. In so doing, the court below gave the defendants an undue advantage -- as this Court should now make clear. However, this error was immaterial, for all the evidence made unmistakably clear that the predominant purpose of the Georgia legislature was to create three majority-black districts in order to satisfy the demands of the Civil Rights Division.

## III. Any Registered Voter Has Standing To Attack A Racial Gerrymander.

The complaint in *Shaw* alleged that the State defendants had violated the Fourteenth and Fifteenth Amendments by creating congressional districts which

were based on racial classifications. The premise was that such use of race undermined and demeaned the electoral process and thereby injured all registered voters -- including the five white voters who had filed the complaint. The most logical interpretation of the Court's opinion in *Shaw* is that the stigmatic injury resulting from such use of race creates standing for any registered voter. The *Hays* court reached this conclusion. *See* 839 F.Supp. at 1192. Likewise, Judge Phillips found that, as registered voters, the plaintiffs had established their standing in *Shaw v. Hunt,* 861 F.Supp. at 425;[10] and in *Vera*, Judge Jones accepted his analysis. 861 F.Supp. at 1331, n. 38. [11]

Indeed, the objections to standing that have been posed in the present appeals seem to ignore several factors. The rationale for the racial gerrymanders in

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10 In support of standing, the court relied especially on *Regents of the Univ. of California v. Bakke,* 438 U.S. 265 (1978); *Northern Florida Contractors v. Jacksonville,* 1135 S.Ct. 2297 (1993); and *Heckler v. Matthews*, 465 U.S. 728 (1984).

11 In the Jurisdictional Statement in *Shaw v. Reno* (No. 92-357), the plaintiff-appellants presented six questions, of which one concerned the standing of white voters to contest the racial gerrymander. When the Court noted probable jurisdiction, it stated a single question to be argued and briefed. In their *amicus* brief, the States of North Carolina and Texas place emphasis on the absence of any reference to standing in the issue stated by the Court. However, in light of the language of the majority opinion in *Shaw* -- which goes beyond the matters specifically raised in the Court's question -- the States reliance seems misplaced.

Louisiana and Georgia -- just as for the racial gerrymander in North Carolina -- was to assure election of black representatives to Congress to represent the interest of the particular state's African-Americans. The African-American members of Congress, selected from the majority-black districts, are given the special role of representing persons of their racial group -- whether or not those persons reside in the districts from which the African-American representatives are elected. As stated in *Shaw*:,

> The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interest of one racial group, elected officials are more likely to believe that their primary obligation is to representing only members of that group rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

*Id.* at 2827. [12]

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12 This hypothesis, expressed in *Shaw*, was corroborated by the trial testimony of Congressman Melvin Watt, who represents North Carolina's notorious twelfth district. This testimony "speaks for itself, [*see, e.g., Tr.* pp. 999-1001] representing a district that you are consistent with in your philosophies allows you to be consistent in voting your conscience *without buckling under or catering*, as you said

(continued...)

The inevitable consequence of the racial **gerrymander is that white voters in the majority-black districts will often feel themselves unrepresented and that black voters in the other districts will have a similar feeling. Moreover, this system of vicarious representation of racial and ethnic groups is at odds with the seeming purpose of 2 U.S.C. § 2c -- which, in requiring that members of Congress be elected from single-member districts, contemplates that the primary duty of each member will be to provide representation to the voters of his district, rather than to the members of his race. Likewise, it contravenes the intent expressed by the disclaimer of proportional representation in Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.** [13]

*In some of the briefs submitted by appellants and their allies, it has been suggested that the majority-black districts are more "integrated" than any of the other congressional districts.* See, e.g., Amicus Brief of Black

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12(...continued)
my statement said, to other interests that may not predominate in my district [such as the 'business or *white community*'] (emphasis added)". *See* 861 F.Supp. at 478. n.5 (Voorhees, Jr. dissenting).

13 If proportional representation is to be allowed, this should be done openly by repealing the single-member district requirement in 2 U.S.C. § 2c and allowing states to use race-neutral electoral systems like cumulative voting or single-transferable votes. To try to blend proportional representation by race with a statutory requirement of single-member districts is so irrational as to raise equal protection issues.

*Congressional Caucus* in *Johnson*, at 20-22. By this it apparently is meant that a substantial percentage of both whites and African-Americans will reside in the same congressional district. However, this "integration" is achieved by "bleaching" the other congressional districts -- reducing their population of African-Americans.

Furthermore, the purported "integration" of the majority-black district is itself a misnomer. Typically, in order to meet the goal of a "safe" district in which an African-American is almost sure to be elected, a number of black urban concentrations of voters are linked together by splitting precincts or census blocks which are predominantly white in population.[14] Although unnecessary to establish standing, the many collateral ill effects of racial gerrymanders reinforce the standing of white voters to obtain judicial relief from this practice.

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14 North Carolina's two majority-black districts provide the best example of how these "strings of black pearls" may be created with the aid of computer technology. The State contains 229,000 of the approximately 7 million census blocks in the United States; and racial information was available as to each block. Census blocks in which African-Americans resided were linked together by narrow corridors of census blocks in which mostly whites resided. Obviously this technique -- which apparently has also been employed to some extent in Louisiana and Georgia -- discriminates against the white voters because they are more likely than African-Americans to be placed in different congressional districts from the neighbors with whom they share common interests.

## IV. Neither Louisiana Nor Georgia Established A Compelling State Interest For Their Racial Gerrymanders.

### A. The Burden Of Persuasion Rests On The State As To This Purported Justification.

In *Shaw* the Court observed that the State must have a "strong basis in evidence for [concluding] that remedial action [is] necessary". 113 S.Ct. 2832. Consistent with this comment, the burden of persuasion must rest on the State as to any defense that a racial gerrymander is justified by its "narrow tailoring" to satisfy a "compelling State interest" [15] Indeed, to place the burden of persuasion elsewhere would mock the concept of "strict scrutiny".

### B. Compliance With The Unauthorized Demands Of The Civil Rights Division Is Not A Compelling State Interest.

In Louisiana, Georgia, and North Carolina, the State legislatures ultimately bowed to the exercise by the Civil Rights Division of its preclearance power under

15 Moreover, a party usually bears the burden of persuasion as to its affirmative allegations and as to issues on which it must produce evidence. See 9 Wigmore, Evidence, § 2486 (Chadbourne Rev. 1981); 2 McCormick, Evidence, § 337 (4th Ed. 1992).

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. That power was being exercised pursuant to the Attorney General's erroneous premise that, under the Voting Rights Act, majority-minority districts must be "maximized". However, as the *Hays* court has emphasized, *see* 839 F.Supp. at 1196-7, n. 21, the Voting Rights Act provides no basis for this policy of maximization; and the disclaimer of proportional representation in Section 2 (the "Dole amendment) indicates a legislative intent to the contrary. *See also*, *Johnson DeGrandy*, 114 S.Ct. 2647 (1994). [16]

Even aside from the obvious abuse of its preclearance authority by the Justice Department, there are several reasons why a state's surrender to that authority does not constitute a "compelling State interest". For one thing, the Attorney General is only empowered to "interpose an objection" -- rather than to make findings of fact. Moreover, no administrative hearing precedes the interposing of an objection; the statute prescribes no standard for the sufficiency of the evidence to justify interposing an objection; and there is no direct judicial review of the Attorney General's action in interposing or

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16 The overextension of its authority by the Civil Rights Division is also reflected in 28 C.F.R. § 51.55 (b), which empowers the Attorney General to deny preclearance even when she concludes that a "submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2."

withholding an objection. To claim that the results of such an informal and wholly discretionary procedure can have the practical effect of negating the equal protection rights of registered voters seems absurd.

The absurdity is compounded by the availability of a judicial remedy under Section 5 itself. If that remedy is utilized, a formal hearing will be conducted and specific findings and conclusions of law will be entered by the three-judge District Court in the District of Columbia. Short of exhausting their judicial remedies, neither Louisiana nor Georgia has a basis for claiming a "compelling State interest" to comply with Section 5.

Admittedly, obtaining judicial relief may cause delay and cost money; however, such delay and expense -- when weighed against the important constitutional rights involved -- are more than tolerable. Moreover, 2 U.S.C. § 2a provides a solution for the short-term problems of delay -- a solution far preferable to that of saddling voters with racially gerrymandered districts until after the next census.

Section 5 specifically provides that neither an objection by the Attorney General, a failure to object, nor a declaratory remedy pursuant to that Section "shall bar a subsequent action to enjoin enforcement of" a redistricting plan. Appellants seek to circumvent that provision by asserting that their desire to comply with

Section 5 is itself a "compelling State interest" which justifies use of the redistricting plan. This evasion should not be tolerated. [17]

### C. Louisiana And Georgia Failed To Demonstrate A Compelling State Interest In Compliance With Section 2 Of The Voting Rights Act.

In *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), this Court announced three requirements for requiring the creation of single-member districts in order to comply with Section 2 of the Voting Rights Act. One of these conditions was "geographical compactness". In *Growe v. Emison*, 113 S.Ct. 1075 (1993), the Court applied the *Gingles* conditions to congressional districts.

When the location of the African-American population in Louisiana and Georgia is considered, it appears that, under *Gingles* and *Growe,* Section 2 would not require Louisiana to have more than one majority-

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17 In their *amicus* brief the States of Texas and North Carolina argue that the recognition of this purported "compelling governmental interest" will help preserve for states a necessary freedom from federal control -- apparently a reference to control by the Federal courts. In the case of North Carolina, at least, it seems odd that the State should be relying in its defense on the State's acquiescence in the unreasonable position of the Department of Justice lawyers, with whom the General Assembly unsuccessfully struggled for months to obtain preclearance of the State's first redistricting plan. North Carolina, should be welcoming judicial intervention now to allow it to use a plan more similar to the one it initially wished to use.

black congressional district and Georgia to have more than two. However, pursuant to its misguided and illegal policy of maximization of these districts, the Civil Rights Division was insisting on two majority-minority districts for Louisiana and three for Georgia. The capitulation of these two states to this insistence is now being justified as a "compelling State interest" -- apparently on the theory that someone might have successfully sued the states for their failure to "maximize".

In view of the lack of "geographic compactness", these purported concerns seem "pretextual" -- to use a favorite term of the Civil Rights Division.[18] However, appellants and their allies would respond that "compactness" is a very relative concept and that Louisiana and Georgia might have more at risk than at first would appear. This argument is overstated. Apparently the Court believed that "geographic compactness" had a clear meaning when it announced the *Gingles* conditions. The term "compactness" has also been

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18 Apparently the State of Georgia itself is not asserting this defense of a "compelling governmental interest" in compliance with Section 2; byt the other appellants explain that this omission is due to other litigation in which Georgia is involved and, therefore, should be disregarded. However, it does seem somewhat odd that Georgia is vigorously disputing allegations of Section 2 violations in other cases, but here is relying on the threat of possible lawsuits against it to justify its infringement on the equal protection rights of its voters by reason of its racial gerrymander.

used by Justices of this Court on another occasion; [19] and presumably they also believed that the term was clear. Moreover, at various times "compactness" has been used in federal and state statutes concerning redistricting and reapportionment.

In short, one must conclude that the alleged uncertainty of "traditional districting principles" and of concepts like "compactness" is much less than appellants would like this Court to believe. As a corollary, it seems clear that the racial gerrymanders in Louisiana and Georgia were not the result of a desire to comply with Section 2 or of the belief that Section 2 dictated the creation of the additional majority-black districts on which the Civil Rights Division insisted. Thus, Section 2 does not give rise to a "compelling State inteest" as contended by appellants.

## V. Neither Louisiana Nor Georgia "Narrowly Tailored" Their Redistricting Plans.

As has been previously noted, Louisiana and Georgia have the burden of persuading the factfinder that

19 *See, United Jewish Organizations v. Carey*, 430 U.S. 144, 168 (1977) ("employing sound districting principles, such as *compactness* and population equality") (emphasis supplied). *See also, Drum v. Seawell*, 249 F.Supp. 988 (M.D.N.C) (1966) (three-judge court) (requiring "compactness" and "contiguousness" in a congressional redistricting plan)..

their plans were "narrowly tailored". At the very least, this would require a showing that there was a consideration of other alternatives to the creation of majority-black districts.[20] Furthermore, if these States were to create majority-minority districts, narrow tailoring would require that, to the greatest extent possible, these districts be drawn pursuant to "traditional districting principles". There is little indication that any effort was made along these lines; and certainly there is no showing that some of the majority-minority districts could not have been made more compact. Certainly if a state seeks to defend its racial gerrymandering on the ground of "narrow tailoring" to meet a "compelling State interest" it should be required to show that it exerted its best effort to minimize the disruption that resulted from its purported need to meet its "compelling State interest". Neither Louisiana nor Georgia have made any such showing.

In *Shaw v. Hunt* the majority, over Judge Voorhees' strong objection, seemed to take the position that if it were necessary to create a majority-minority

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20 One such alternative might be to provide that a second primary would not be necessary if the leader in the first primary received more than a prescribed percentage of the votes cast. *Cf.* N.C.G.S. § 163-111. Also, if there were no restrictions on voting in a party primary by voters not registered as members of that party, imposition of such a restriction might be considered. Apparently measures of this type were not considered as a possible way to meet whatever State interest was believed to require the creation of majority-black districts.

district, then the Court should not review how that district was drawn. In *Vera*, Judge Edith Jones cogently takes issue with this approach, 861 F.Supp at 1343-44, n.55. As she points out, in *Shaw* the Court observed that the deliberate creation of majority-minority districts to remedy past discrimination was only constitutionally permissible beyond the framework of the Voting Rights Act if the State employed sound districting principles and if the racial groups' residential patterns permitted the creation of districts, *see* 113 S. Ct. at 2832. Her logic is persuasive that "these statements bear importantly on the 'fit' between the state's compelling interest in addressing Voting Rights concerns and the form of the districts that must be narrowly tailored to suit them". *Ibid.* Under Judge Jones' rationale -- which conforms to the plain meaning of "narrow tailoring" -- "a racially constructed district must satisfy other neutral districting criteria". *Ibid.* [21] Neither Louisiana nor Georgia have made any such showing.

The rationale of "narrow tailoring" would also seem to require that there be some nexus between the placement of majority-black districts and the past discrimination which is supposed to justify the remedial

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21 The importance for constitutional purposes of having legislative districts which have rational boundaries seems to have been assumed by the Court in *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

action. [22] In *Dolan v. City of Tigard,* 114 S.Ct. 2309 (1994), the Court held that when property is taken for a public purpose due process requires "essential nexus", "rough proportionality", and "individualized determination". In the context of equal protection, "narrow tailoring" would seem to demand a somewhat similar showing -- especially that an "individualized determination" was made as to whether a majority-minority district was necessary, what percentage of minority persons was necessary to achieve the required result, and where the boundaries of the district could be located with minimum disruption to voter participation and competition in the political process. Neither Louisiana nor Georgia came anywhere near meeting such requirements.

## CONCLUSION

When all is said and done, the basic argument which appellants and their allies advance in support of the majority-black districts in Louisiana and Georgia is that, after Reconstruction, African-Americans were not elected to Congress from Southern states and it is necessary now to make up for past sins. However appealing this

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22 Such a nexus was notably absent in North Carolina's congressional redistricting plan, for there was little effort -- especially with the snakelike Twelfth District -- to relate the district boundaries to the counties which were subject to preclelarance because of past discrimination. Indeed, in the Twelfth District the percentage of registered black voters was higher than the percentage of white voters. *See* Jurisdictional Statement in *Shaw v. Hunt*, No. 94-923 at 24.

argument may seem at first glance, it has many defects.

For one thing, the cure may be as bad as the disease; the majority-minority districts tend to breed resentment on the part of whites and thereby increase the racial polarization they are intended to reduce. Moreover, they reduce the incentive to form multi-racial coalitions of voters. Even more important, however, their creation signifies a retreat from the ideal of a color-blind society and a new emphasis on "descriptive representation", rather than "substantive representation".[23]

Secondly, the majority-minority districts are premised on racial stereotypes; and these stereotypes are becoming increasingly inaccurate. Thus, the black community is no longer as monolithic as it may have seemed at one time. White voters seem to have recognized this fact and have been willing to consider black candidates in terms of their individual views -- rather than in terms of stereotypes. Significantly, two blacks -- J.C. Watts and Gary Franks have been elected to Congress in the recent past from overwhelmingly white congressional districts; but, unlike the African-Americans

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23 In her recent book about the representation of black interests in Congress, Carol Swain, an African-American political scientists, makes the important distinction between "descriptive representation:" of black voters -- their representation by black officeholders -- and "substantive representation" -- their representation by persons of whatever race who advance the interests of black voters. *See*, Swain, BLACK FACES, BLACK INTERESTS, P. 5 (1993).

elected from majority-minority districts, these representatives are Republicans.[24]

Furthermore, the absence of black officeholders in past years may be somewhat misleading. In this connection a comparison is in order. Women in the United States did not have a constitutional right to vote until the Nineteenth Amendment was ratified in 1920. Since then the candidacy of women for political office has increased significantly, but there are still relatively few women in the Congress. However, an extensive survey recently released by the National Women's Political Caucus shows that when women have run for public office, they have been successful to the same extent as men. Similarly, the significantly lower percentage of black elected officials than white may not be attributable solely to race but also to many other factors -- such as fewer candidates, less financial support, and the well-entrenched position of some white incumbents.

Whatever the cause may be, the use of majority-minority districts to increase the number of African-Americans in the Congress should be approached cautiously and every effort must be made to find other

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24 The increased openness of the American electoral process is also evidenced by the fact that currently a Native-American serves in the Senate from Colorado and that some years ago a Japanese-American was elected to the Senate from California -- the State where Japanese-Americans were interned during World War II. *See Korematsu v. United States, supra.*

alternatives. Clearly neither Louisiana nor Georgia made such a search for alternatives; and even though this failure may have been in part attributable to the coercive and misguided tactics of the Civil Rights Division, that is not an adequate excuse for depriving the Plaintiff-Appellees of their equal protection right to vote in congressional districts whose boundaries are nowdrawn on the basis of racial classifications. In both *Hays* and *Johnson*, the judgments of the Court below should be affirmed.

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